BLANK
PAGE

SUPREME COURT, U. S.

SEP 17 1965

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 494.

BURNHAM VAN SERVICE et al.,
Appellants,

vs.

CAYCE R. PENTECOST et al.,
Appellees.

MOTION TO DISMISS APPEAL.

GEORGE F. McCANLESS,
Attorney General,
MILTON P. RICE,
Assistant Attorney General,
GEORGE SHUFF,
General Counsel,
Tennessee Public Service Commission,
Counsel for Appellees.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

BLANK PAGE

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	5
I. The decision below is clearly correct	5
II. There is no important question of Federal law	7
Conclusion	11

Cases Cited.

American Refrigerator Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899 (p. 82 of 174 U. S.) 7

Bibb v. Navajo Freight Lines Co., 359 U. S. 520, 3 L. Ed. (2d) 1003 9

Braniff Airways v. Nebraska, 347 U. S. 590, 98 L. Ed. 973 ..... 6, 9

Caldwell v. N. C., 187 U. S. 622, 47 L. Ed. 336 9

Central R. R. v. Pennsylvania, 370 U. S. 607, 8 L. Ed. (2d) 720 ..... 5, 6

Communist Party of the U. S. v. Subversive Activities Control Board, 367 U. S. 1, 6 L. Ed. (2d) 625 10

Cramp v. Board of Public Instruction, 368 U. S. 278, 7 L. Ed. (2d) 285 10

Johnson Refining Co. v. Okla., 290 U. S. 158, 78 L. Ed. 238 8

Northwest Airlines v. Minn., 322 U. S. 292, 88 L. Ed. 1283 8

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 93 L. Ed. 585 8

Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694 9
Shafer v. Farmers Grain Co., 268 U. S. 189, 69 L. Ed. 909 9
United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754 10
Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708 8

Statute Cited.

Tennessee Code Annotated, Title 67, Chapter 9 ..... 2, 3

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 494.

BURNHAM VAN SERVICE et al.,
Appellants,
vs.
CAYCE R. PENTECOST et al.,
Appellees.

MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

OPINION BELOW.

This case was summarily disposed of in the Supreme Court of Tennessee, which denied certiorari without the rendering of an opinion. The Court of Appeals, which is the intermediate appellate court of Tennessee, did render a full opinion which has not as yet been officially reported. The opinion of the Court of Appeals, as well as that of the Chancery Court of Davidson County, are correctly reproduced as Appendices I and II of the Jurisdictional Statement.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED.

Whether irregular route motor carriers, operating within, into and through Tennessee and engaged in the moving of household goods or similar enterprises, but having no fixed properties in Tennessee, are liable for ad valorem tax assessment by the Tennessee Public Service Commission under a Tennessee statute according to such properties a tax situs and ordaining the assessment of the properties of such carriers upon the basis of the ratio of miles traveled in Tennessee to total mileage, without offending the interstate commerce and due process clauses of the federal constitution.

STATUTE INVOLVED.

The pertinent provisions of the Tennesse utility and carrier assessment statute (Chapter 9 of Title, 67 T. C. A.) are accurately set forth in Appendix IV, p. 37 et seq., of the Jurisdictional Statement.

STATEMENT.

This litigation concerns the application of those provisions of the Tennessee utility and motor carrier assessment statute, providing for the assessment of the properties of irregular route motor carriers, to the properties of appellants. Appellants are with one exception movers of household goods, and all appellants are nonresident motor carriers engaged entirely in interstate commerce.

In Tennessee there is the customary general ad valorem property tax, but since 1949 none of such tax has been collected by the State government. Counties and mu-

nicipalities within the State are all authorized to levy the tax at whatever rate they elect, and the assessment of property for tax purposes is likewise conducted locally with the exception of the properties of carriers and public utilities. The latter are assessed under State statute by the Tennessee Public Service Commission (until a few years ago known as the Railroad and Public Utilities Commission). Assessments made by the Commission are certified by that body back to the various counties and municipalities, which then proceed to collect their respective taxes from the taxpayers upon the basis of such assessments.

In the case of irregular route motor carriers having no fixed properties within Tennessee, but operating upon the public highways of Tennessee, § 67-901, T. C. A., deems them to have a situs within Tennessee by virtue of such operations.

All carriers operating in Tennessee are required biennially to file schedules with the Commission setting forth certain basic information as to their identities, domiciles, receipts, property holdings, operations, etc. Section 67-906, T. C. A., imposes specifically upon irregular route motor carriers the duty of including in their schedule their total mileage operated during the preceding calendar year within the boundaries of Tennessee and of each county, municipality and taxing district authorized by law to collect ad valorem taxes within the State. They are also required to state their entire vehicle mileage incurred everywhere. Under § 67-913, T. C. A., anyone failing or refusing to file required schedules or statements is deemed to have waived the statutory manner or mode of assessing the value of his property and is thereby bound to accept the valuation placed thereon by the Commission, as well as the distribution or allocation of same made by the Commission.

Nine of appellants failed to file the required schedules and their properties were arbitrarily assessed by appellees. The other eighteen filed schedules but did not undertake in so doing to afford any breakdown of their Tennessee mileage as between the various municipalities, counties and taxing districts. The operating experience to be reported was that incurred during the year 1958, and it was to provide the basis for assessment of appellants' properties for the years 1959 and 1960.

As the Public Service Commission was about to make distribution of appellants' ad valorem assessments in the latter part of 1959, appellants instituted this proceeding by filing a petition for certiorari from the action of the Commission in the Chancery Court of Davidson County. A supersedeas staying the distribution of the assessments was granted and remains in force. The petition for certiorari thus filed attacked the Tennessee statutes in question upon the grounds urged in the Jurisdictional Statement.

The Chancery Court dismissed appellants' petition for certiorari upon the ground that the statutes in question were constitutional and had not been shown to have been unconstitutionally applied to appellants. An appeal was taken to the Court of Appeals of Tennessee, and the Middle Division thereof affirmed the action of the Davidson County Chancery Court. The Supreme Court of Tennessee denied certiorari, whereupon appellants instituted this appeal.

ARGUMENT.

The question presented by this appeal is in no sense a new one. It represents but a renewed effort by a single species of interstate carrier to avoid taxation of its properties by states and localities wherein its rolling stock operates, contrary to the oft-repeated pronouncements of this Court. While it is true that no case hitherto decided by this Court has dealt directly with the taxation on an apportioned basis of the rolling stock of an irregular route motor carrier by a non-domiciliary state, the truth is that there are even more compelling reasons for the sanctioning of such taxation than for upholding taxation of railroad, bargeline and air lines rolling stock. The latter are as a rule required to maintain some fixed properties in the state they traverse in the course of business, which properties are taxed like local property. They thus contribute to local government for the benefits afforded them and protections enjoyed.

On the other hand, appellants by nature are itinerants whose activities are such that terminal facilities, offices, etc. are unnecessary in the great majority of states whose public highways they utilize. Requiring no such localized property, they escape ad valorem taxation altogether unless the states can accord to them a theoretical situs for taxation of a fairly apportioned part of their rolling stock.

I.

The Decision Below Is Clearly Correct.

Appellees submit that the right of the State of Tennessee to provide for the ad valorem assessment and taxation of appellants' properties in question is clearly established in **Central R. R. v. Pennsylvania**, 370 U. S.

607, 8 L. Ed. (2d) 720, where it was said at p. 615 of 370 U. S.:

> "... a nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State."

Due process objections to ad valorem taxation of rolling stock by nondomiciliary states are without substance absent a showing that such property was not regularly or habitually in the taxing jurisdiction during the tax period. **Braniff Airways v. Nebraska,** 347 U. S. 590, 98 L. Ed. 973.

The record herein clearly demonstrates that all of appellants have had properties in Tennessee at various times and places, and some of them habitually or continuously. **By the very nature of an interstate household mover's business, it could not be otherwise.** Such an enterprise must necessarily make itself available to move anyone anywhere at any time. If it fails to do so, it is out of the market.

Thus, in a very real sense, the rolling stock of a household mover is ubiquitous. It is continually in all localities of all states, and potentially so at every moment.

This indisputable fact belies appellants' argument that their properties are never so continuously in any given city or county so as to make them amenable to assessment. To grant such a premise would be to deny to any save domiciliary states the right to exact ad valorem taxes of appellants.

Appellants apparently concede to the states of their domicile the right to tax their total rolling stock (pp. 15-16, Jurisdictional Statement). The record fails how-

ever to reveal any assertion of such jurisdiction against appellants. There is thus no showing of a risk of multiple burdens if Tennessee's tax stands.

Apart from this fact however, appellants simply have no legal right to concede away Tennessee's taxing jurisdiction asserted in a manner comporting with this Court's opinions. When appellants admit the substantial presence of their properties in Tennessee during a tax year, they foreclose their right to contend that all of such values belong to their home states.

II.

There Is No Important Question of Federal Law.

While as hereinbefore stated the Jurisdictional Statement adequately sets forth the formal jurisdictional requisites of this appeal, in reality there is no federal question of substance to be dec

The cases relied upon by appellants to make an important question of federal law out of the one here presented actually serve to buttress the decision reached in the courts below.

It was held for instance in **American Refrigerator Co. v. Hall**, 174 U. S. 70, 43 L. Ed. 899 (p. 82 of 174 U. S.):

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, **where the specific and individual items of property**

> **so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business,** and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed" (Emphasis supplied).

In **Union Refrigerator Transit Co. v. Lynch**, 177 U. S. 149, 44 L. Ed. 708, the quoted language was relied upon to sustain an ad valorem property tax as against the contention that the property had no situs in the taxing state and the tax unlawfully burdened interstate commerce. In **Johnson Refining Co. v. Okla.**, 290 U. S. 158, 78 L. Ed. 238, the principle was restated to deny the right of a carrier's state of domicile to tax the carrier's entire property, a result which appellants here contend for. In **Northwest Airlines v. Minn.**, 322 U. S. 292, 88 L. Ed. 1283, taxation of a nonresident carrier, this Court upheld the domiciliary state's right to tax the entire fleet but in so doing made the pertinent observation (at p. 297 of 322 U. S.):

> "The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered."

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 93 L. Ed. 585, states the basis for taxation by nondomiciliary states. At p. 174 of 336 U. S. it is observed:

> "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. . . . Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

It can hardly be gainsaid that appellants look to the State of Tennessee alone for protection of their properties while they are within its borders, a situation which by their own admission may exist at any moment throughout the tax year and which appellants doubtless hope will exist as frequently as possible. Appellants make no question respecting the apportionment scheme employed by Tennessee, and they could hardly do so in view of the fact that it employs the ratio of appellants' Tennessee mileage to total mileage. If the Tennessee proportion of the total is large, the Tennessee assessment will be correspondingly large; if it is small, the assessment will be small; and in the unlikely event that any of them have during the tax year no Tennessee mileage, no part of their properties will be taxed.

Braniff Airways v. Nebr., 347 U. S. 590, 98 L. Ed. 967, clearly establishes the proposition that regular contact with the taxing state in the course of business will establish a taxing situs, even though that contact be small in the context of the carrier's over-all operations. **Bibb v. Navajo Freight Lines Co.**, 359 U. S. 520, 3 L. Ed. (2d) 1003, is wholly inapposite to the case at bar inasmuch as it involved a regulatory rather than a taxing statute. Even so, it recognizes that state statutes imposing regulations on interstate commerce will be struck down only when they discriminatorily affect the commerce. **Shafer v. Farmers Grain Co.**, 268 U. S. 189, 69 L. Ed. 909, likewise involved a regulatory statute, and the latter was stricken down apparently because it invaded a field preempted by a federal statute. No such situation exists in the case at bar. The cases of **Caldwell v. N. C.**, 187 U. S. 622, 47 L. Ed. 336, and **Robbins v. Shelby County Taxing Dist.**, 120 U. S. 489, 30 L. Ed. 694, struck down state taxes as violative of the commerce clause, but these taxes were very clearly privilege taxes. Privilege taxes upon interstate commerce, and the receipts therefrom have histor-

ically been disallowed by this Court, and for the very obvious reason that they subject interstate commerce to the danger of cumulative burdens, being susceptible of duplication by other states. This is not true in the case of a properly apportioned ad valorem tax.

It is thus more than apparent no constitutional question arises on the face of the statute of which appellants complain. Conceding for the sake of argument that this statute, like almost any other statute, though valid on its face might be unconstitutionally applied in a particular situation, this Court is not required to anticipate such an eventuality in the face of no showing whatever that it has been so applied. Courts, including this Court, have historically declined to make constitutional adjudications upon the basis of hypothetical fact situations, and to anticipate situations which may not arise.

To have standing to attack the constitutionality of a statute, a party must show that he had sustained or is immediately in danger of sustaining some direct injury as a result of the statutes enforcement. **Cramp v. Board of Public Instruction,** 368 U. S. 278, 7 L. Ed. (2d) 285. The power of this Court to pass upon the constitutionality of a statute will arise only when the interests of litigants require the use of that judicial authority for their protection against actual interferences, a hypothetical threat being insufficient. **United Public Workers v. Mitchell,** 330 U. S. 75, 91 L. Ed. 754. Mere potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. **Communist Party of the U. S. v. Subversive Activities Control Board,** 367 U. S. 1, 6 L. Ed. (2d) 625.

Appellants have wholly failed to show that Tennessee has applied the statute in question in such manner as to

affect them adversely other than to exact of them their fair tax burden. The possible literal compliance with the statute from which they recoil with trepidation is not demonstrated to be a reality. At this point it is little more than a figment of appellants' imagination. Substantial compliance with the statute requiring the filing of schedules reflecting mileage traveled in Tennessee is all that has been demanded of appellants. There is no showing that Tennessee expects to demand any more. Appellants are therefore in no posture to complain that their interstate commerce is unconstitutionally burdened.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the appeal herein should be dismissed.

.....

GEORGE F. McCANLESS,
Attorney General,

.....

MILTON P. RICE,
Assistant Attorney General,

.....

GEORGE SHUFF,
General Counsel,
Tennessee Public Service Commission,
Counsel for Appellees.

Proof of Service.

I, Milton P. Rice, one of the attorneys for appellees, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of Sep-

tember, 1965, I served a copy of the foregoing Motion to Dismiss Appeal to the Supreme Court of the United States upon the Honorable J. G. Lackey, Jr., Stephenson, Lackey & Holman, First Federal Building, 236 Fourth Avenue, North, Nashville, Tennessee, one of the attorneys for appellants herein by mailing a copy thereof in a duly addressed envelope, U. S. postage prepaid.

.....

Milton P. Rice,
Assistant Attorney General.

END